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Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC

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COURT OF APPEAL (PUTRAJAYA) — CIVL APPEAL NO W-02(NCvC)(W)-307–02 OF 2019
KAMALUDIN MD SAID, LEE SWEE SENG AND GUNALAN MUNIANDY JJCA
26 JANUARY 2022

C

Civil Procedure — Judgment — Foreign judgment — Enforcement of foreign judgment — Enforcement of judgment of Abu Dhabi Court of First Instance (Commercial) — Whether appellants were the parties against whom judgment was entered — Whether High Court judge had taken correct approach regarding enforcement of foreign judgment

D

Evidence — Admissions — Admissions of liability — Respondent applied to enforce foreign judgment — Respondent tendered English translations of foreign judgment — Appellants contended that appellants not parties to foreign judgment based on translations of judgment — Letter from appellants' solicitor stated that appellants gave consent to respondent to apply for release of monies attached by foreign court — Whether letter form appellants' solicitor constituted admission by appellants that there was foreign judgment against them

E

F

Evidence — Documentary evidence — Admissibility of — Application to enforce foreign judgment — Admissibility of English translations of judgment of Abu Dhabi Court of First Instance (Commercial) — Admissibility of trade licenses — Maker of documents did not testify — Whether High Court judge erred in deciding that documents were admissible under s 73A(2) of the Evidence Act 1950 — Evidence Act 1950 s 73A(2)

G

H

The appellants had established a joint venture company in Abu Dhabi known as SPK-Bina Puri JV ('the JVCo'). Tamouh Investments LLC ('Tamouh') had appointed the JVCo as the main contractor for a construction project and the JVCo vide a letter of offer dated 14 July 2007 ('the letter of offer') had appointed the respondent as a subcontractor. The respondent had completed their work but there was a sum of AED20,178,958.25 due and owing by the JVCo to the respondent. The respondent brought an action in the Abu Dhabi Court of First Instance (Commercial) for the said sum against the JVCo, the appellants and Tamouh. The Abu Dhabi court handed down the Abu Dhabi judgment ('the ADJ') in favour of the respondent, but Tamouh was ousted as a party to the said proceedings. Based on the statement of defence, Tamouh had

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paid a sum of AED24,843,600 into the Abu Dhabi Commercial Court to be held in custody for the appellants. In addition, there was also a letter from the appellants' solicitor, Messrs Kesavan ('the Kesavan letter') stating that the appellants had given their consent to the respondent to apply for the release of the monies which were attached by the Abu Dhabi Court. The respondent then filed an application at the Kuala Lumpur High Court ('the HC') to enforce the ADJ. The HC had allowed the respondent's claim against the appellants for the construction work done by the respondent. The learned HC judge ('the HCJ') entered judgment for the respondent upon being satisfied that the ADJ was adequately proven for the purpose of admission into evidence pursuant to s 73A(2) of the Evidence Act 1950 ('the EA') even though Ebada, the author of the second, third and fourth translations of the ADJ did not testify in the case. In deciding the case, the HCJ had taken into consideration the letter of offer, the Kesavan letter which allegedly admitting the appellants' liability, the ADJ and the four translations of the ADJ. Further, the HCJ had also considered the evidence of: (a) the respondent's solicitor in Abu Dhabi ('PW1') and the translator of the first translation of the ADJ ('PW2') that the nomenclature mistakes as regards the appellants' correct names in the translations of the ADJ occurred because the source documents ie the trade licenses were not given to the translator and once the trade licenses were given, the names of the appellants were correctly depicted in the fourth translation; (b) the respondent's director ('PW3') who had admitted that he had sent the ADJ for translation; and (c) the appellants' witnesses ('DW1 and DW2'). Dissatisfied with HCJ's decision, the appellants filed the present appeal. In deciding the appeal, the court had considered the issue arose during the trial ie whether based on the totality of the evidence, the witnesses' testimonies and the documentary evidence, it had been proven on a balance of probabilities that appellants were the parties against whom the Abu Dhabi Court entered judgment. The court had also considered the issue of whether the Kesavan letter amounted to an admission by the appellants that there was a ADJ against them.

Held, dismissing the appeal with costs of RM10,000 to be paid by each of the appellant to the respondent subject to allocator:

(1) In evaluating the parties' evidence on the translation issue, the HCJ gave due weight to the evidence of PW1 that although Ebada was the author of the second, third and fourth translations, it did not mean that the translations or contents could only be explained by him and further, that he worked in the firm which was headed by PW2 and that, both she (being fluent in Arabic) and PW2 could explain the various translations, albeit done by Ebada. The court agreed with the HCJ's view that, ideally, under the present circumstances Ebada should have testified but, in view of PW2's explanation as to why both Ebada and he could not come together to Malaysia during the month of Ramadan, there was no basis to

draw an adverse inference against the respondent because of his absence. The court did not find any error in the HCJ's view that PW2's explanation should be considered credible and convincing (see paras 61–62).

(2) The court agreed with the HCJ that that the exercise of ascertaining the correct names of the parties in the ADJ could not be considered an attempt at varying or amending the judgment when it was obvious that the names of the appellants had been wrongly spelt. The trial judge's conclusion was upon being satisfied with the evidence of PW1 and PW2 and that they were both capable and qualified to testify as to the contents of the translations and the reason as to why the translator did not get the correct names of the appellants in the first, second and third translations. The HCJ accepted PW1 and PW2 as being truthful and credible witnesses. There was no error shown to the court by the HCJ's acceptance of the nomenclature mistakes in the first, second and third translations were because the source documents ie the trade licenses were not given to the translator and that, once the trade licenses were given to the translator, the names of the appellants were correctly depicted in the fourth translation (see paras 68 & 70–71).

(3) In relation to the issue of the validity of the admission of the trade licenses into evidence to support the correctness of the fourth translation, the court agreed with the respondent's contention that there was no flaw shown in the approach taken by the HCJ on this dispute. The HCJ viewed the trade license as merely source document, for the translations and there was nothing sinister about the licenses and whether to reject or to admit the trade licenses, the court must look at it in totality and not in isolation in the circumstances of the case. Various cases were referred by the HCJ including s 73A(1) and (2) of the EA before he concluded that there was no prejudice to the appellants. Hence, there was no plain error shown to the court as regards this conclusion (see paras 72 & 77).

(4) The HCJ had correctly asked the pertinent question that if the appellants were not the parties named in the ADJ, then why did the appellants give their consent (via the Kesavan letter) for the respondent to apply for the release of the monies which were attached by the Abu Dhabi Court. Further, there was no evidence adduced that the Kesavan letter was issued without the authority of the appellants. The court was satisfied that it was not erroneous for the HCJ to conclude based on his finding that the Kesavan Letter was an admission of liability by the appellants, the issues raised by the appellants to oppose the respondent's action at the HC were rendered irrelevant and bereft merits. Nevertheless, the HCJ had given due consideration to these issues and made findings of fact based on a proper evaluation of the evidence as a whole (see paras 97–99).

(5) The HCJ held that the appellants had failed to establish that the Abu Dhabi Court had no jurisdiction or that the ADJ was obtained by fraud or that it would be contrary to public policy. Hence, the question as to the Abu Dhabi Court not having jurisdiction of that the judgment being illegal or irregular would not, in the present context, arise. The HCJ had taken an approach that was correct in principle regarding the enforcement of a foreign judgment for a specific sum of money (see paras 81, 86–87 & 100).

(6) In arriving at the conclusion that the fourth translation was correct and credible, the HCJ had considered all the contemporaneous documents and circumstances in support of the said translation shown by the respondent. In effect, the evidence as a whole and the surrounding factors disclosed without doubt that the appellants were among the parties mentioned in the ADJ. The HCJ had considered all the relevant documents ie the letter of offer, the Kesavan letter, the ADJ and the four translations together with the evidence of PW1, PW2, PW3, DW1 and DW2 in totality. For the foregoing reasons, the appellants had failed to demonstrate to the court that the HCJ who had seen and heard the witnesses and sufficiently evaluated all the evidence, both oral and documentary, had come to a finding that was plainly wrong, had erred in principle or had decided against the weight of evidence. Therefore, there were no merits in law or fact in this appeal to warrant intervention against the reasoned decision of the HCJ (see paras 102–104).

[Bahasa Malaysia summary

Perayu-perayu telah menubuhkan sebuah syarikat usaha sama di Abu Dhabi yang dikenali sebagai SPK-Bina Puri JV ('JVCo'). Tamouh Investments LLC ('Tamouh') telah melantik JVCo sebagai kontraktor utama untuk satu projek pembinaan dan JVCo seterusnya melalui surat tawaran bertarikh 14 Julai 2007 ('surat tawaran tersebut') telah melantik responden sebagai subkontraktor. Responden telah menyiapkan kerjanya tetapi terdapat sejumlah AED20,178,958.25 yang terhutang oleh JVCo kepada responden. Responden mefailkan tindakan di Mahkamah Tingkatan Pertama (Komersial) Abu Dhabi untuk jumlah tersebut terhadap JVCo, perayu-perayu dan Tamouh. Mahkamah Abu Dhabi memberikan penghakiman ('ADJ') yang memihak kepada responden, tetapi Tamouh telah disingkirkan sebagai pihak dalam prosiding tersebut. Berdasarkan pernyataan pembelaan, Tamouh telah membayar sejumlah AED24,843,600 kepada Mahkamah Komersial Abu Dhabi untuk dipegang bagi pihak perayu-perayu. Selain itu, terdapat juga surat daripada peguam cara perayu-perayu, Tetuan Kesavan ('surat Kesavan') yang menyatakan bahawa perayu-perayu telah memberikan persetujuan mereka kepada responden untuk memohon pelepasan wang yang dipegang oleh Mahkamah Abu Dhabi. Responden kemudiannya memfailkan permohonan di Mahkamah Tinggi Kuala Lumpur ('MT') untuk

menguatkuasakan ADJ tersebut. Mahkamah Tinggi telah membenarkan tuntutan responden terhadap perayu untuk kerja pembinaan yang dilakukan oleh responden. Hakim MT yang bijaksana ('HMT') memberikan penghakiman yang memihak kepada responden setelah berpuas hati bahawa ADJ telah dibuktikan dengan secukupnya bagi tujuan penerimaan keterangan menurut s 73A(2) Akta Keterangan 1950 ('AK') walaupun seorang yang bernama Ebada iaitu penulis bagi terjemahan kedua, ketiga dan keempat ADJ tersebut tidak memberi keterangan dalam kes. Dalam memutuskan kes, HMT telah mengambil kira surat tawaran, surat Kesavan yang didakwa telah mengakui liabiliti perayu-perayu, ADJ dan kesemua empat terjemahan ADJ tersebut. Selanjutnya, HMT juga telah mempertimbangkan keterangan: (a) peguam cara responden di Abu Dhabi ('PW1') dan penterjemah terjemahan pertama ADJ ('PW2') bahawa kesilapan tatanama berkenaan dengan nama-nama perayu-perayu yang betul dalam terjemahan ADJ tersebut berlaku kerana dokumen sumber iaitu lesen-lesen perdagangan tidak diberikan kepada penterjemah dan sebaik sahaja lesen-lesen perdagangan tersebut diberikan, nama perayu-perayu telah dinyatakan dengan betul dalam terjemahan keempat; (b) pengarah responden ('PW3') yang mengakui bahawa beliau telah menghantar ADJ tersebut untuk terjemahan; dan (c) saksi-saksi perayu ('DW1 dan DW2'). Tidak berpuas hati dengan keputusan HMT, perayu-perayu memfailkan rayuan semasa. Dalam membuat keputusan rayuan, mahkamah telah mempertimbangkan isu yang timbul semasa perbicaraan iaitu sama ada berdasarkan keseluruhan keterangan, keterangan saksi-saksi dan keterangan dokumentari, ia telah dibuktikan berdasarkan imbangan kebarangkalian bahawa perayu-perayu adalah pihak-pihak yang dimasukkan penghakiman oleh Mahkamah Abu Dhabi. Mahkamah juga telah mempertimbangkan isu sama ada surat Kesavan tersebut merupakan pengakuan oleh perayu-perayu bahawa terdapat ADJ terhadap mereka.

Diputuskan, menolak rayuan dengan kos RM10,000 dibayar oleh setiap perayu kepada responden tertakluk kepada alokator:

(1) Dalam menilai keterangan pihak-pihak berkenaan isu terjemahan, HMT memberi pertimbangan yang sewajarnya kepada keterangan PW1 bahawa walaupun Ebada adalah penulis terjemahan kedua, ketiga dan keempat, ia tidak bermakna terjemahan atau kandungan terjemahan tersebut hanya boleh dijelaskan olehnya dan seterusnya, bahawa dia bekerja di firma yang diketuai oleh PW2 dan bahawa, kedua-dua dia (fasih berbahasa Arab) dan PW2 boleh menerangkan terjemahan-terjemahan tersebut, walaupun terjemahan-terjemahan tersebut ditulis oleh Ebada. Mahkamah bersetuju dengan pandangan HMT bahawa, secara idealnya, dalam keadaan ini Ebada sepatutnya memberi keterangan tetapi, mengambil kira penjelasan PW2 tentang mengapa kedua-dua Ebada dan beliau tidak boleh datang bersama ke Malaysia pada bulan Ramadan, tidak ada asas untuk membuat inferens

bertentangan terhadap responden atas ketidakhadirannya. Mahkamah tidak mendapati apa-apa kesilapan dalam pandangan HMT bahawa penjelasan PW2 harus dianggap kredibel dan meyakinkan (lihat perenggan 61–62).

(2) Mahkamah bersetuju dengan HMT bahawa tindakan untuk memastikan nama-nama pihak yang betul dalam ADJ tidak boleh dianggap sebagai percubaan untuk mengubah atau meminda penghakiman apabila jelas bahawa nama perayu-perayu telah disalah eja. Kesimpulan hakim bicara dibuat setelah berpuas hati dengan keterangan PW1 dan PW2 dan bahawa mereka berdua mampu dan layak untuk memberi keterangan tentang kandungan terjemahan-terjemahan tersebut dan sebab mengapa penterjemah tidak menyatakan nama yang betul bagi perayu-perayu dalam terjemahan pertama, kedua dan ketiga. Hakim Mahkamah Tinggi menerima PW1 dan PW2 sebagai saksi yang jujur dan boleh dipercayai. Tiada kekhilafan yang ditunjukkan kepada mahkamah berkenaan dengan penerimaan HMT terhadap kesilapan tatanama dalam terjemahan pertama, kedua dan ketiga adalah kerana dokumen sumber iaitu lesen-lesen perdagangan tidak diberikan kepada penterjemah dan bahawa, sebaik sahaja lesen-lesen perdagangan tersebut diberikan kepada penterjemah, nama-nama perayu telah dinyatakan dengan betul dalam terjemahan keempat (lihat perenggan 68 & 70–71).

(3) Berhubung dengan isu kesahihan penerimaan lesen-lesen perdagangan tersebut sebagai keterangan untuk menyokong ketepatan terjemahan keempat, mahkamah bersetuju dengan hujah responden bahawa tiada kecacatan yang ditunjukkan dalam pendekatan yang diambil oleh HMT mengenai perkara ini. Hakim Mahkamah Tinggi melihat lesen-lesen perdagangan tersebut sebagai dokumen sumber semata-mata, untuk terjemahan dan tiada apa-apa yang mencurigakan tentang lesen-lesen tersebut dan sama ada untuk menolak atau menerima lesen-lesen perdagangan tersebut, mahkamah mesti melihatnya secara menyeluruh dan bukan secara berasingan dalam keadaan kes. Pelbagai kes telah dirujuk oleh HMT termasuk s 73A(1) dan (2) AK sebelum beliau membuat kesimpulan bahawa tiada prejudis kepada perayu-perayu. Oleh itu, tiada kekhilafan yang jelas ditunjukkan kepada mahkamah berkenaan kesimpulan ini (lihat perenggan 72 & 77).

(4) Hakim Mahkamah Tinggi telah menanyakan persoalan yang betul bahawa sekiranya perayu-perayu bukan pihak yang dinamakan dalam ADJ, maka mengapakah perayu-perayu memberikan persetujuan mereka (melalui surat Kesavan) untuk responden memohon pelepasan wang yang dipegang oleh Mahkamah Abu Dhabi. Tambahan pula, tiada keterangan menyatakan bahawa surat Kesavan dikeluarkan tanpa izin perayu-perayu. Mahkamah berpuas hati bahawa adalah tidak salah untuk HMT membuat kesimpulan bahawa isu-isu yang dibangkitkan oleh

perayu-perayu untuk mencabar tindakan responden di MT telah menjadi tidak relevan dan tidak bermerit berdasarkan dapatan beliau bahawa surat Kesavan adalah pengakuan liabiliti oleh perayu-perayu. Namun begitu, HMT telah memberikan pertimbangan yang sewajarnya kepada isu-isu ini dan membuat dapatan-dapatan fakta berdasarkan penilaian yang sewajarnya terhadap keterangan secara keseluruhan (lihat perenggan 97–99).

(5) Hakim Mahkamah Tinggi berpendapat bahawa perayu-perayu telah gagal untuk membuktikan bahawa Mahkamah Abu Dhabi tidak mempunyai bidang kuasa atau bahawa ADJ tersebut diperolehi melalui penipuan atau bahawa ia akan bertentangan dengan dasar awam. Oleh itu, persoalan mengenai Mahkamah Abu Dhabi yang tidak mempunyai bidang kuasa bahawa penghakiman tersebut menyalahi undang-undang atau tidak teratur, dalam konteks kes ini, tidak akan timbul. Hakim Mahkamah Tinggi telah mengambil pendekatan yang betul pada prinsipnya mengenai penguatkuasaan penghakiman asing untuk sejumlah wang tertentu (lihat perenggan 81, 86–87 & 100).

(6) Apabila membuat kesimpulan bahawa terjemahan keempat adalah betul dan boleh dipercayai, HMT telah mempertimbangkan semua dokumen dan keadaan kontemporari yang menyokong terjemahan tersebut yang ditunjukkan oleh responden. Kesannya, keterangan secara keseluruhan dan faktor sekeliling menunjukkan tanpa keraguan bahawa perayu-perayu adalah antara pihak yang disebut dalam ADJ tersebut. Hakim Mahkamah Tinggi telah mempertimbangkan semua dokumen yang berkaitan iaitu surat tawaran, surat Kesavan, ADJ dan kesemua empat terjemahan tersebut bersama-sama keterangan PW1, PW2, PW3, DW1 dan DW2 secara keseluruhan. Atas sebab-sebab di atas, perayu-perayu telah gagal untuk menunjukkan kepada mahkamah bahawa HMT yang telah melihat dan mendengar saksi-saksi dan menilai dengan secukupnya semua keterangan lisan dan dokumentari, telah mencapai keputusan yang jelas salah, telah terkhilaf pada prinsip atau telah membuat keputusan bertentangan dengan pemberatan keterangan. Oleh itu, tiada merit dalam undang-undang atau fakta dalam rayuan ini untuk mewajarkan campur tangan terhadap keputusan HMT yang beralasan (lihat perenggan 102–104).]

Cases referred to

Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)

He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] 7 CLJ 271, FC (refd)

Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)
Meinhardt Singapore Pte Ltd v Teo A Khing Design Consultants Sdn Bhd [2016] MLJU 532; [2016] 1 LNS 894, HC (refd)
Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180; [1977] 1 LNS 24 (refd)
Sabah Land Development Board v Teraju Hijau Sdn Bhd [2018] MLJU 1740; [2018] 1 LNS 1800, CA (refd)
Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd [2016] 1 MLJ 375, CA (refd)
See Hua Daily News Bhd v Tan Thien Chin & Ors [1986] 2 MLJ 107; [1985] 1 LNS 131, SC (refd)
Segaran Mathavan v Landfeld Quasa Engineering Sdn Bhd & Yang Lain [2014] 1 LNS 158, HC (refd)

Legislation referred to

Evidence Act 1950 ss 62, 64, 73A, 73A(1), (2), 101, 103, 114(g), Chapter V

Appeal from: Suit No WA-22NCVC–20–01 of 2018 (High Court, Kuala Lumpur)

Foong Kitson (Nicholas Poon with him) (Kit & Assoc) for the first appellant.
Foo Joon Liang (Lee Hui Juan with him) (Gan Partnership) for the second appellant.
John Khoo Boo Lai (Jimmy Gay Choon Hee with him) (Ismail Khoo & Assoc) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal by the defendants/appellants against the judgment of the High Court in Kuala Lumpur ('KLHC') which allowed the paintiff/respondent's claim against them for construction work done by the Plaintiff. The action in the High Court was premised on a judgment given by the Abu Dhabi Court of First Instance (Commercial) Plenary in Case No 224/2013 dated 17 March 2015 ('Abu Dhabi judgment').

[2] The learned High Court judge ('LHCJ') entered judgment for the plaintiff upon being satisfied that the Abu Dhabi judgment was adequately proven for the purpose of admission into evidence pursuant to s 73A(2) of the Evidence Act 1950 ('the EA'). Judgment was given against the appellants based

purely on the Abu Dhabi judgment which was the pleaded premise of the respondent's action.

FACTS OF THE CASE

[3] For ease of reference, parties will be referred to as they were in the High Court.

[4] The present action is predicated on the judgment of the Abu Dhabi Court of First Instance (Commercial) Plenary in Case No 2241/2013 dated 17 March 2015 ('the ADJ'), whereupon the plaintiff is seeking a judgment against Pembinaan SPK Sdn Bhd ('D1') and Bina Puri Holdings Bhd ('D2') for the sum of Abu Dhabi Dinar (AED) 20,718,958.25 (equivalent to RM22,790,854.08) being the amount that was allegedly ordered against D1 and D2.

[5] The plaintiff is a limited liability company ('LLC') which is registered as a branch in Abu Dhabi, United Arab Emirates which provides engineering services and sells/installs equipment and machinery for air conditioning and refrigeration systems.

[6] D1 and D2 are companies registered in Malaysia, having both registered addresses a nd business addresses in Malaysia. D1 and D2 established a joint venture company known as, SPK-Bina Puri JV ('the JVCo').

[7] Pursuant to a letter of understanding dated 7 May 2007 issued by Tamouh Investments LLC ('Tamouh'), the JVCo was appointed as the main contractor for the 'Design and Built Contract for Phase 1 Plot I Zone B Residential, Commercial and Recreational Development on Al Reem Island, Abu Dhabi, United Arab Emirates' ('the Al Reem project').

[8] In order to facilitate their presence in Abu Dhabi and to set up their respective offices in Abu Dhabi, D1 and D2 each had a trade licence and were registered in Abu Dhabi as foreign company branches. The trade licences for D1 and D2 expired in 2013.

[9] The plaintiff was appointed as the JVCo's subcontractor via a letter dated 14 July 2007. According to the plaintiff, they completed their subcontract work and that there is a sum of AED 20,718,958.25 which is due and owing by the JVCo to the plaintiff.

[10] According to the statement of defence, Tamouh had paid a sum of AED 24,843,600 into the Abu Dhabi Commercial Court to be held in custody for the defendants.

[11] On 27 August 2013, the plaintiff filed legal proceedings in Abu Dhabi against the JVCo, D1, D2 and Tamouh via Abu Dhabi Court of First Instance (Commercial) Plenary Case No 2241/2013 ('the Abu Dhabi case') claiming for the sum of AED20,718,958.25 which is due and owing to the plaintiff.

[12] On 17 March 2015, the Abu Dhabi Court of First Instance (Commercial) handed down the Abu Dhabi judgment and it was (allegedly) against the first three defendants ie the JVCo, D1 and D2. Pursuant to the ADJ, the fourth defendant in the Abu Dhabi Case, Tamouh, was 'ousted' (struck off) as a party to the said legal proceedings.

[13] The plaintiff filed the present action to enforce the ADJ in Malaysia against the defendants.

[14] The defendants' defence is that the ADJ on which the current suit is predicated is not directed at the defendants as they were not the entities named as defendants in the Abu Dhabi judgment. It is contended by the defendants that there is no evidence in regard to the proper identity of the defendants named in the Abu Dhabi judgment.

[15] The defendants also contended that liability for payment is not triggered as they are not in 'receipt' of any payment from Tamouh as Tamouh paid AED24,843,600 into the Abu Dhabi Commercial Court and the said sum is to be held in custody for the defendants.

[16] The defendants also disputed the translations of the ADJ from Arabic into English and submitted that the parties named in the Abu Dhabi judgment are not the defendants.

FINDING OF THE LEARNED HIGH COURT JUDGE

[17] LHCJ allowed the plaintiff's claim as follows:

(a) judgment is hereby entered against the defendants based on the judgment obtained previously by the plaintiff against the defendants in Abu Dhabi, United Arab Emirates or 17 March 2015 for the judgment sum of AED20,718,958.25 (equivalent to RM22,790,854.08);

(b) interest at 5%pa on AED20,7I8,958.25 (or equivalent to RM22,790,854.08) from 17 March 2015 until the date of full realisation of the judgment;

(c) defendants to pay for costs of RM60,000 (subject to 4% allocator);

A (d) the sum of RM70,000 paid to the firm of Messrs Kit & Associates pursuant to the order for security for costs as ordered by the Penang High Court is to be released forthwith to the plaintiff's solicitors together with all interest accrued thereon; and

B (e) the trial costs awarded in favour of the plaintiff today is to be set off against all interlocutory costs previously ordered by the Penang High Court.

[18] The LHCJ held as follows:

C (a) the Kesavan letter operates as a tacit admission of liability by the defendants and has an overarching effect on the several issues that were raised by the defendants in attempting to distance themselves from the ADJ;

D (b) in light of the admission of liability, the question of there being no valid translation of the ADJ and/or there being no evidence to prove that the defendants are the parties named in the ADJ or that there is no evidence that the ADJ was properly procured in accordance with the substantive and adjectival laws of the United Arab Emirates or that the claim is E contrary to cl 10.1 of the JVCo' s letter of appointment dated 14 July 2007 ('pay when paid'), or that the JVCo was not joined as a party to the present suit, is no longer alive or extant;

(c) the non-joinder of the JVCo is not fatal since the defendants' liability is F 'joint and several' with the JVCo. It is up to the plaintiff to choose which of the parties they wish to proceed against. Indeed, it was even open to the defendants to have applied to join the JVCo as a co-defendant;

(d) as JVCo is an unregistered entity in Abu Dhabi, a non-juristic legal entity G and has no legal status, its absence from the present suit is a non-issue and is not a legal impediment vis a vis the common law action based on the Abu Dhabi judgment;

(e) by taking up the 'pay-when-paid' issue, the defendants have unwittingly H impliedly portrayed that 'but for' the lack of payment by Tamouh, they are in fact liable to make payment for the subcontract work;

(f) PW2's explanation regarding Ebada's absence appears to be credible and convincing. There is no basis to draw an adverse inference merely because Ebada did not testify;

I (g) PW1 and PW2 are both capable and qualified to testify as to the contents of the translations and the reasons as to why the translator did not get the correct names of D1 and D2 in the first, second and third translations;

(h) it is clear that the nomenclature mistakes as regards D1 and D2's correct names occurred because the source documents (trade licences) were not given to the translator;

(i) as such, once the trade licences were given, the names of D1 and D2 were correctly depicted in the fourth translation;

(j) there is absolutely no evidence to suggest that the Abu Dhabi case pertained to parties other than D1 and D2.

(k) the defendants' plea of non-service of the cause papers and/or that they knew nothing about the Abu Dhabi case or ADJ until they were served with the cause papers in the present action does not sit well with the implications arising out of and/or in connection with the Kesavan letter;

(l) there is no prejudice to the defendants and it is only fair, just and proper that pursuant to s 73A(1) and (2) of the Evidence Act 1950, the trade licences ID (1) and ID (2) be received as evidence and they are hereby admitted as 'P1' and 'P2' respectively;

(m) it is clear from the Tamouh letter of undertaking dated 7 May 2007, that D1 and D2 are jointly and severally liable in so far as the Al Reem project is concerned. However, the ADJ states that D1 and D2 are to 'jointly' pay the judgment sum. The word 'severally' is not stated in the ADJ;

(n) the plaintiff neither uses the word 'jointly' nor 'jointly and severally' with respect to the amount that is claimed in the reliefs; and

(o) the plaintiff has proven on a balance of probabilities that D1 and D2 are indeed the parties named in the ADJ and that it is a final and conclusive judgment by a foreign court of competent jurisdiction and it has not been demonstrated that it was obtained by fraud or that it would be contrary to public policy and that the proceedings in which the judgment was obtained were opposed to natural justice.

THE FIRST APPELLANT'S SUBMISSION

[19] The plaintiff had never adduced the original copy of the purported Abu Dhabi judgment at trial. Therefore, the first appellant submitted that the High Court had erred in allowing the plaintiff's claim when no such primary evidence was produced during trial.

[20] The plaintiff had failed to adduce any evidence to support the plaintiff's contention that the plaintiff purportedly completed the subcontract work. No invoices, delivery orders, purchase orders, progress claim and payment certificates whatsoever was ever produced by the plaintiff as evidence. It is submitted that the High Court had erred in finding that the plaintiff had completed the work.

[21] The content of the Kesavan letter is consistent with the defendants' pleaded defence at paras 8–9 of the defence. The first appellant submitted that nothing more can be read into the content of the Kesavan letter as no evidence was led as to any tacit or implied implication of the Kesavan letter. Therefore, the High Court had erred in finding that the Kesavan letter operates as a form tacit or implied admission of liability by the first defendant by making unsubstantiated assumption and presumption as to the effect and implication of the Kesavan letter.

[22] The discrepancy between these four translations cast serious doubt to the plaintiff's case as to whether the entities named in those translations are the same entities named in this action.

[23] The trade licenses ie ID1 and ID2 not properly admitted as evidence. The original copies of ID1 and ID2 were not produced by the plaintiff nor did the plaintiff called the maker of ID1 and ID2 to testify during trial.

THE SECOND APPELLANT'S SUBMISSION

[24] The fourth translation is incomplete as a document, its translation not attested to and its maker not called to give evidence. Therefore the fourth translation is not admissible under s 73A(1) of the Evidence Act 1950.

[25] As Ebada being the material witness since the fourth translation was relied upon by the High Court in giving judgment and was not called by the respondent to testify, adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the respondent.

[26] There is no evidence tendered by the respondent on the value of work allegedly done and as such the respondent had not proved its case on the balance of probabilities.

THE RESPONDENT'S SUBMISSION

[27] The respondent submitted that the contents of the ADJ were never disputed by the appellants.

[28] The appellants' witnesses, DW1 and DW2 had no credibility whatsoever. DW1 was not involved in the project and unable to give basic answers or explanation of what actually happened in Abu Dhabi. DW2 admitted that he had no knowledge of the project in Abu Dhabi.

[29] The translator for the appellants did not turn up in court. Therefore, the High Court was not wrong in rejecting the translation prepared by ITBN.

OUR DECISION

[30] The appellant's basic contention before us in support of their appeal was that the LHCJ had plainly made an erroneous finding that the ADJ had been proved under the EA when in fact the primary element for the judgment to be translated into the national language to render it admissible into evidence had not been fulfilled. They disputed the translation of the ADJ from Arabic to English.

[31] More importantly, the appellants' defence in the main was that the ADJ on which the current suit is predicated is not directed at them as they are not the defendants named therein. It was further contended that there was no evidence adduced at the trial to establish the identities of the defendants named in that judgment.

[32] The appellants have contended that liability for payment against them had yet to be triggered or crystallise as they had not been in receipt of any payment from Tamouh who had paid a sum of AED24,843,600 into the Abu Dhabi Commercial Court which was being held in custody for them.

[33] The LHCJ's findings on the core issues for determination are that the plaintiff has proven on a balance of probabilities:

(a) that D1 and D2 are indeed the parties named in the ADJ;

(b) that it is a final and conclusive judgment by a foreign court of competent jurisdiction; and

(c) it has not been demonstrated that it was obtained by fraud or that it would be contrary to public policy and the proceedings in which the judgment was obtained were opposed to natural justice.

[34] In the determination of this appeal, we must first and foremost bear in mind the trite principle that the onus lies on the appellants/defendants in this appeal to satisfy the appellate court that the learned trial judge was plainly wrong and no reasonable judge would have decided in the manner that he did. Only then can an appellate court exercise its appellate powers to intervene to correct a wrong that would have caused substantial injustice.

[35] It was brought to our attention that the Federal Court in *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 7 CLJ 271 reiterated how the English Supreme Court in *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 considered what the 'plainly wrong' test meant, and explained it as follows (see paras 111–112 of the judgment):

A *What matters is whether the decision under appeal is one that no reasonable judge could have reached*. (Emphasis added.)

B **[36]** We will now proceed to deliberate on the grounds of appeal and the principles of law applicable to the instant facts to determine whether the appellants had satisfied the plainly wrong test that would justify intervention by us with the decision of the High Court arrived at after a full trial.

C **[37]** For convenience, it would be useful to set out a summary of the first appellant's ('A1') grounds of appeal which are:

(a) the purported ADJ, the primary evidence and subject matter of the plaintiff's claim was not adduced as evidence by the plaintiff;

D (b) no evidence whatsoever was adduced by the plaintiff to support the plaintiff's contention that the plaintiff had completed the subcontract work that fell within the scope and purview of the letter of appointment dated 14 July 2007;

(c) the Kesavan letter does not operate as any form of tacit admission of liability by the first defendant;

E (d) the first defendant was not correctly identified in the purported ADJ. There were various discrepancies and inconsistencies contained in the four translations of the purported ADJ particularly in the name of the first defendant; and

F (e) the trade licenses ie ID1 and ID2 ought to be rejected as evidence.

G **[38]** As regards the ADJ which was the substratum of respondent's claim, appellant relied on the trite law principle that whoever alleges facts must produce the necessary evidence in proof of such facts. The burden is always on the plaintiff to prove the plaintiff's case in order to succeed at trial (see ss 101 and 103 of the Evidence Act 1950) and the principle expounded in the Federal Court case of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 which held as follows:

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> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim potior est condition defendantis. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is

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bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor* (Woodroffe and Amir Ali, Vol 3 at pp 3190–3191)

[39] The first appellant also made reference to the statutory provisions governing admission of documentary evidence prescribed in Chapter V, Evidence Act 1950, in particular, s 64 which stipulates that 'Documents must be proved by primary evidence except in the cases hereinafter mentioned' and s 62 that states 'Primary evidence means the document itself produced for the inspection of the court'.

[40] In the first appellant's submission, the primary evidence or the original copy of the document itself is the best evidence available and must be produced at the trial.

[41] On this primary point canvassed by the first appellant, suffice for us to refer to the judgment of this court in *Sabah Land Development Board v Teraju Hijau Sdn Bhd* [2018] MLJU 1740; [2018] 1 LNS 1800 where it was pronounced that:

> We were also mindful of the fact that the plaintiff had never supported and/or corroborated their allegation that the sum of RM5,357.88 was due and outstanding. We are saying that the plaintiff had failed to prove its case for the simple reason that they had failed to produce the invoices allegedly sent to the defendant and the plaintiff had also failed to prove the amounts out standing. It is the duty of the plaintiff to prove its case on a balance of probabilities as required under s 101 of the Evidence Act 1950.
>
> We are of the view that the invoices, if any, were and are material and best evidence to determine the existence of the alleged outstanding balance and to establish the number of days outstanding as required under cl 9.23. It is improbable for the learned JC to rely on oral testimony of witnesses, which at best is corroborative in nature. The existence and the contents of the invoices must be proved by the production of the invoices in the court. The burden of proof lies on the plaintiff. If a party has failed to discharge its burden of proof on the standard required by the law, his adversary does not bear the burden to adduce any evidence. It is not the defendant's duty to fill up the gaps in the plaintiff's case (see *The Carbon Company Sdn Bhd v Ng Lee Hoon* [2017] 6 CLJ 189).

[42] As pointed out to us, the Court of Appeal held in para 34 of its judgment that in the absence of original copies of the invoices, the High Court had in fact reversed the burden of proof from the plaintiff to the defendant in relation to the three invoices.

[43] We agree with the first appellant that the subject-matter of the present action before the High Court was the ADJ. However, the respondent had never

A adduced the original copy of the said judgment.

[44] Based on the non-production of the ADJ at the trial, the first appellant contended that the failure or omission by the respondent clearly warranted appellate interference for these reasons:

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(a) the original copy of the ADJ was in the possession of the respondent whose director (PW3) had admitted in cross-examination that he had sent the same for translation;

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(b) the appellant instead produced four defective translations of the ADJ that were riddled with inconsistencies as proof of the existence of the judgment that they had obtained from the Abu Dhabi Court; and

(c) the High Court had erred in principle in allowing the claim despite primary evidence not having been produced at the trial. It was in breach of the best evidence rule and the provisions of the Evidence Act 1950. Hence, there was no evidence in support of the plaintiff's action herein.

D

[45] We would pause here to observe that the issues posed for determination before the trial judge were as follows:

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(a) whether the ADJ is enforceable in Malaysia?

(b) whether the names of the parties in the ADJ have been correctly translated?

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(c) whether the plaintiff can enforce a judgment against a party that is not named in the foreign judgment? and

(d) in the event, the ADJ is enforceable, whether the defendants are jointly and severally liable to the plaintiff?

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[46] The thrust of the second appellant's appeal too was the purported failure of the respondent to prove the existence of the ADJ in accordance with the requirements of the EA in a common law action. We were urged to bear in mind that the following facts were not in dispute:

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(a) a complete and certified translation of the ADJ was not produced in evidence;

(b) the maker of the purported English translation of the ADJ was not called to give evidence. The second appellant will submit that the ADJ was therefore not proved under the EA. As such, the entire premise of the action before the High Court was not in evidence;

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(c) further, the makers of the tool relied upon by the High Court to establish the relationship between the ADJ and the appellants — namely, the trade

licences in Abu Dhabi — were not called as witnesses. Again, the second appellant will submit that these trade licences were not proven under the EA; and

(d) the test for s 73A of the EA to admit documentary evidence was not met. In fact, the High Court did not consider the test to be applied for the s 73A(2) exception to the rule against documentary hearsay.

[47] From the analysis by the LHCJ of the issues to be tried and the contentions advanced by the appellants, it would appear that the very existence of the ADJ was not a seriously disputed issue. As correctly remarked by the LHCJ, the nub of the defence in the present action is that the ADJ (on which the current suit is predicated) is not directed at the defendants as they are not the entities named as defendants in the ADJ. The appellants contend that the evidence adduced at the trial in relation to the translations of the ADJ which is in the Arabic language, is riddled with translational errors and discrepancies.

[48] In regard to the central dispute as to whether the defendants ('D1 and D2') are not the entities that are named in the ADJ, it would revolve on the translation dispute, in particular relating to the spelling inaccuracies in the names of D1 and D2. In support of the LJ's finding on this issue, the respondent relied on the testimony of PW1 who explained that the spelling inaccuracy of D1 and D2's names in the first, second and third translations occurred because D1 and D2's trade licenses (ie exh P1 and P2) were not provided to the translator.

[49] As to the role of PW1, she was the plaintiff's solicitor in Abu Dhabi and she filed the Abu Dhabi case against the JVCo, D1, D2 and Tamouh. She said that under the laws of the United Arab Emirates, the JVCo is not registrable as a corporate entity. She said the trade licences can be viewed online from the website of the Abu Dhabi Economic Department and can be accessed and printed via online search.

[50] By reference to the said trade licences, (exhs D1 and D2) in respect of their registration as foreign branch offices in Abu Dhabi the correct names of D1 and D2 as per registration in the Abu Dhabi Court are Pembinaan SPK Sdn Bhd and Bina Puri Holdings Bhd respectively.

[51] PW1's evidence which the LJ accepted was that the trade licences were obtained officially by conducting an online search at the Economic Department of Abu Dhabi which contain the exact names of D1 and D2. According to her, the exact names of D1 and D2 as per the trade licences were not provided to the translators of the first, second and third translations to enable their names to be correctly translated to the English version. However,

in respect of the fourth translation, the trade licences of D1 and D2 were provided to the translator which explains the translation of the first page of the ADJ.

[52] PW1, as the solicitor who had obtained the ADJ was able to positively confirm D1 and D2 as the second and third defendants in the ADJ.

[53] In regard to the principal issue on the translation point as to which of the translations is correct the LJ pointed out in his judgment at para 149 that:

> ... the defendants initially sought to rely on a translation by one Jasmani Mardi of ITBN. He was supposed to testify on behalf of the defendants. But, he did not turn up in Court to give evidence on behalf of the defendants. In the result, there was no oral testimony by any witness to support the contents of the ITBN translation. As such, the ITBN translation (pp 226–234 B) carries no weight and is hereby excluded from the present discussion as to the identity of the entities named in the ADJ.

[54] It was undisputed that there were four sets of translations of the ADJ, it is obvious enough that the first, second and third translations are translations of the whole of ADJ, whereas the fourth translation is only a translation of the first page of the same judgment.

[55] The LJ held the view that the first three translations did not correctly state the names of D1 and D2 which, instead, were variously depicted in those translations whereas the fourth translation captured the names of D1 and D2 correctly, ie, the names as per the trade licences. He also accepted as credible the explanation of DW1 and DW2 for the discrepancies in their names in the said translations and the reason why their actual names were not stated. Also that the fourth translation captures their names correctly as per the trade licences which were the source documents provided to the translator.

[56] Basically, the reason which PW1 proffered is that because of the differences in the alphabet or vowels in Arabic, certain words will not be accurately translated from Arabic into English and that in order to get the exact name, the source document has to be provided to the translator. PW2 supported this explanation, adding that certain letters in the English alphabet do not have an Arabic equivalent. Hence, the necessity to rely on the source document.

[57] A point of concern raised by the defendants against the acceptance of the fourth translation as correct and credible was that all the latter three translations were done by one Rabiey Ebada Mohd ('Ebada') while only the first translation was done by one Magdy F EL Sherbiny. Neither of the

translators was called as a witness by the plaintiff for which no explanation was produced. A

[58] The thrust of the defendants' contention on this point was that in order to resolve the nomenclature discrepancies it is mandatory for the plaintiff to produce the original copy of the second, third and fourth translation and to call the maker, Mr Ebada as a witness during trial (see, s 73A(1) of the Evidence Act 1950). B

[59] Hence, that the strict rules of evidence should be adhered to since the defendants are challenging the admissibility of these translations due to various doubtful discrepancies. C

[60] A summary of the defendants contentions on the translation point and the inadmissibility of the second to fourth translations would be as below: D

(a) that the strict rules of evidence should be adhered to since the defendants are challenging the admissibility of these translations due various doubtful discrepancies;

(b) these documents should not be admissible as the contents are not properly proven before this court (see; *Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd* [2016] 1 MLJ 375 (CA), p 386); E

(c) the plaintiff's translation of the ADJ in particular the second, third and fourth translations, must be rejected as the maker was not called during the trial and no one was able to justify the discrepancies in the translations that were made by the maker, Ebada; F

(d) there is ample basis to draw an adverse inference against the plaintiff as, although there are two translators who were involved in preparing the first, second, third and fourth translations, namely Magdy ('PW2') for the first translation and Ebada for the second, third and fourth translations, the plaintiff only chose to call Magdy to testify as a witness and did not call Ebada who translated three different translations of the same ADJ; and G

(e) it was erroneous for the plaintiff to claim, despite the above, that the fourth translation by Ebada is the accurate translation of the ADJ. H

[61] In evaluating the parties' evidence on the translation issue the LJ gave due weight to the evidence of PW1 that although Ebada was the author of the second, third and fourth translations, it did not mean that the translations or contents could only be explained by him and further, that he worked in the firm which is headed by PW2 and that, both she (being fluent in Arabic) and PW2 could explain the various translations, albeit done by Ebada. I

[62] We share the LJ's view that, ideally, under the present circumstances Ebada should have testified but, in view of PW2's explanation as to why both Ebada and he could not come together to Malaysia during the month of Ramadan, there was no basis to draw an adverse inference against the plaintiff because of his absence. We do not find any error in the LJ's view that PW2's explanation should be considered credible and convincing.

[63] Likewise, the LJ was not shown to have erred in his finding of fact that, based on PW1 and PW2's evidence, they are both capable and qualified to testify as to the contents of the translations and the reasons as to why the translator did not get the correct names of D1 and D2 in the first, second and third translations.

[64] The LJ was justified in accepting as truthful and credible their evidence that any translator who is doing a translation from Arabic to English must be given the source documents, as otherwise there would likely be nomenclature mistakes as is evident from the first, second and third translations of the ADJ.

[65] Based on the evidence before the court, it was a correct finding that the nomenclature mistakes relating to D1 and D2's correct names occurred because the source documents (trade licences) were not given to the translator. It followed that once the said licences were given to the translator the names of D1 and D2 were correctly depicted in the fourth translation.

[66] We accept that the fourth translation, albeit just of the first page of the ADJ, was a standalone page meant to correct the mistake in the nomenclature of D1 and D2 in the first page of the ADJ whereas the remaining pages of the ADJ are correctly depicted in the earlier translations.

[67] Notwithstanding that the fourth translation was not a complete translation of the entire ADJ but just the first page, the LJ duly took into account the present peculiar and specific circumstances where there were three earlier versions of the same judgment and the bone of contention centred around the nomenclature of the defendants and the JVCo. The LJ found that the standalone existence of the fourth translation despite the absence of the translator's attestation did not affect its correctness.

[68] We are in agreement with the LJ that in principle, ultimately, the real question for the trial court would be whether based on the totality of the evidence, the witnesses' testimonies and the documentary evidence, it had been proven on a balance of probabilities that D1 and D2 are the parties against whom the Abu Dhabi Court entered judgment (the ADJ). Also that the exercise of ascertaining the correct names of the parties in the ADJ could not be considered an attempt at varying or amending the judgment when it was

obvious that the names of D1 and D2 had been wrongly spelt. A

[69] In essence, the finding of the LJ on the above question was a finding of fact by a trial judge who had carefully considered the witnesses' testimonies and documentary evidence meticulously before arriving at his conclusion on the identities of the defendants in the ADJ. B

[70] As pointed out to us by the respondent, the trial judge's conclusion was upon being satisfied with the evidence of PW1 and PW2 and that they are both capable and qualified to testify as to the contents of the translations and the reason as to why the translator did not get the correct names of D1 and D2 in the earlier translation (ie the first, second and third translations). The learned judge accepted PW1 and PW2 as being truthful and credible witnesses. C

[71] There was no error shown to us by the trial judge's acceptance of the nomenclature mistakes in the first, second and third translations to be because the source documents (trade licences) were not given to the translator and that, once the trade licences were given to the translator, the names of D1 and D2 were correctly depicted in the fourth translation. D

E

[72] An issue was also raised by the appellants in regard to the validity of the admission of the impugned trade licences into evidence to support the correctness of the fourth translation. We agree with the respondent's contention that there was no flaw shown in the approach taken by the LJ on this dispute. The LJ viewed the trade licence as merely source document, for the translations and there is nothing sinister about the licences and whether to reject or to admit the trade licences, the court must look at it in totality and not in isolation in the circumstances of the case. Various cases was referred by the learned judge including s 73A(1) and (2) of the EA 1950 before he concluded that there is no prejudice to the defendants. Hence, there is no plain error shown to us as regards this conclusion. F G

[73] In relation to the evidential effect of a document that has not been properly proved the defendants made reference to the principle expounded by the learned judge, Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180; [1977] 1 LNS 24 at p 183 ('Public Prosecutor v Datuk Harun') where he spoke of the evidential effect of a document which has not been properly proved: H

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973–1974 and 1972 respectively. As these two exhibits have not I

A been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto ...

B **[74]** In deciding that the trade licences which were originally marked as ID document should be admitted into evidence, the LJ found it instructive to refer to the decision of Ramly Ali, JC (as he then was) in *Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125 at pp 15–16; [2001] 2 CLJ 474 at pp 485–486 HC ('Sim Lim Holdings') where the court held:

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> The counsel for the second and third defendants also submitted that all those documents are only marked as 'ID' and thus only for identification purposes and are not admissible evidence. I cannot agree with the counsel on that point. From the records of the proceedings, it seems that the plaintiff had attempted to produce all those documents as evidence but was objected to by the counsel for the second and
>
> D third defendants. Thus, the court had to decide on the admissibility of all those documents at the end of the trial after hearing all the relevant circumstances of the case. At that stage of the proceedings, all those documents have to be marked as 'ID' first, but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage. Section 73A(2) of the Evidence Act 1950
>
> E empowers the court to do so. The said subsection provides for the exercise of the power 'at any stage of the proceedings, having regards to all the circumstances of the case'. There is nothing to say that those documents cannot be admitted as evidence under s 73A(2) just because they have only been marked as 'ID'.

F **[75]** We do not find any plain error in the LJ's concluding remark on the issue at hand that in view of all the circumstances alluded to above, that there is no prejudice to the defendants and secondly, it is only fair, just and proper that pursuant to s 73A(1) and (2) of the Evidence Act 1950, the trade licences ID(1) and ID(2) be received as evidence and they are hereby admitted as 'P1'
G and 'P2' respectively. Second, that the trade licences were a necessary source document to enable the translator to elicit the correct name of D1 and D2 (per the fourth translation).

H **[76]** Neither was it a flaw for the LJ to view the trade licence as a sort of formal document and is akin to the search result from the Companies Commission of Malaysia and that there is nothing sinister about the trade licences having noted that the defendants had themselves alluded to their trade licences and confirmed that the trade licences expired in 2013. It was justified for the LJ to accept PW1's evidence that the trade licences were available online
I and could be printed.

[77] We have noted that the two trade licences in question were initially marked as identification ('ID') documents only but subsequently converted to and marked as exh P1 and P2 because, as observed by the LJ, the defendants

themselves had observed that the defendants themselves had alluded to their trade licenses and confirmed that the trade licenses expired in 2013. And according to PW1, the licences are available online and can be printed. A correct approach was taken by the LJ in determining whether to admit or to reject the trade licences by looking at this issue in totality and not in isolation under the circumstances of this case. Various authorities were referred to by the LJ and the governing law: s 73A(1) and (2) of the EA before concluding ID1 and ID2 should be admitted into evidence as there was no prejudice occasioned to the defendants. Hence, we see no basis in the appellants' contention that the LJ had erroneously decided this issue and disregard the principles governing admission of documentary evidence.

[78] In our view, the LJ had rightly placed weight on the unchallenged evidence of PW1 who was the plaintiff's lawyer in Abu Dhabi who had filed the legal case against, inter alia, D1 and D2 in the Abu Dhabi Court. The material part of her evidence is quoted in the LJ's judgment as follows:

> We obtained the judgment justly as per the legal framework of the Abu Dhabi Judiciary System and we notified all the parties as per the UAE law. The defendants never appealed and never challenged the said case judgment in Abu Dhabi Court'. He noted that this testimony was not challenged in cross-examination.

[79] We will now proceed to deal with the enforceability issue of the ADJ in Malaysia as a foreign judgment.

[80] As the present action is an action at common law predicated on a foreign judgment, it is settled law that certain legal requirements must be met. Firstly, that the foreign judgment must be an in persoram judgment that is final and conclusive. Secondly, the judgment must be for a specific sum. Thirdly, it must have been given by a court of competent jurisdiction.

[81] Briefly, the LJ held that the defendants had failed to establish that the Abu Dhabi Court had no jurisdiction or that the ADJ was obtained by fraud or that it would be contrary to public policy.

[82] Based on the nature of the action which was to enforce a foreign judgment, the defendants contended pursuant to the principle in the following the case of *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107; [1985] 1 LNS 131 SC, the action is necessarily subject to the following defences which may be raised:

(a) that the foreign court had no jurisdiction;

(b) that the judgment was obtained by fraud;

(c) that the judgment would be contrary to public policy; and

(d) that the proceedings in which the judgment was obtained were opposed to natural justice.

[83] Pertaining to the enforceability point, the main issue raised by the defendants was that they were not the entities named in the ADJ and that the plaintiff had failed to satisfactorily prove to the court in the present action with clarity and certainly they were the entities named in the ADJ.

[84] Secondly, that the whole proceedings had violated the rule of natural justice rendering the ADJ invalid in that the defendants no knowledge of the ADJ or the Abu Dhabi suit initiated by the plaintiff. Finally, that the plaintiff had failed to discharge its burden of proof that the ADJ was a regular judgment obtained in accordance with the laws of Abu Dhabi (references made to *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 (FC))

[85] As pointed out by the LJ, we are totally in agreement that the above issues are inter-connected and can conveniently be dealt with together. The first issue as alluded too revolves substantially on the translation point which we have discussed at length and do not propose to repeat our view on the question of whether D1 and D2 were not the entities named in the ADJ.

[86] First, on the jurisdiction point, the LJ's finding was that the defendant had failed to establish that Abu Dhabi Court had no jurisdiction or that the ADJ was obtained by fraud or that it would be contrary to public policy.

[87] Hence, the question as to the Abu Dhabi Court not having jurisdiction of that the judgment being illegal or irregular would not, in the present context, arise.

[88] As done by the LJ, it would be instructive to set out briefly the background leading to the respondent's claim.

[89] The starting point would be the appointment of the plaintiff by the JVCo vide letter of appointment dated 14 July 2007. However, the JVCo was not a legal entity in Abu Dhabi as they could not be registered under the company legislation of UAE. The appointment was for purposes of execution of the Al Reem project and the entities physically present in Abu Dhabi were only D1 and D2 through their foreign branch offices as per the trade licences. D1 and D2 did not dispute their presence in Abu Dhabi until the project was completed in 2013 which corresponded with the expiry of their trade licences. The JVCo in fact comprises D1 and D2.

[90] A noteworthy fact is that it is not the defendants' case that the plaintiff has been paid but that Tamouh has not paid them and instead, had paid the monies into the Abu Dhabi Court. Hence, that the defendants were not in receipt of payment from Tamouh in accordance with cl 10.1 of the said letter of appointment. It meant that the JVCo's liability for payment had not been triggered.

[91] The plaintiff on the contrary, contends that although it was the JVCo which appointed the plaintiff, they are entitled to sue D1 and D2 because they had agreed as per the letter of understanding dated 7 May 2007 that they are jointly and severally liable for the Al Reem project and further, D1 and D2 are the drivers of the JVCo.

[92]] The LJ found that by raising the 'pay-when-paid' issue the defendants are implicitly acquiescing to the position that the plaintiff's claim herein has been brought against the right parties, but that it is premature and liablity has not been triggered as the defendants were not in receipt of the payment from Tamouh.

[93] Next for our determination concerns a solicitors' letter on which the LJ placed much emphasis in deciding the dispute before him. The disputed issue was whether the letter by the defendants' previous solicitors, ie Messrs Kesavan, vide its letter dated 26 July 2016 (the LJ referred it as 'Kesavan letter') amounts to an admission by the D1 and D2 that there was a ADJ against them.

[94] It was the LJ's categorical finding that the Kesavan letter had the effect of being an admission of the claim. As such, in view of that letter all the issues raised by D1 were no longer alive or tenable.

[95] The appellants' position was that the said letter going by its ordinary meaning from a plain and literal reading does not denote any admission of liability by them to the plaintiff's claim. All that is purportedly stated therein is that there is no objection for the plaintiff to institute attachment proceedings on monies paid into court by Tamouh Investment LLC and Aldar Properties PJSC.

[96] The respondent, on the other hand, contended that the LJ was correct in holding that the letter was tantamount to an admission of liability and correctly held that neither DW1 nor DW2 could render any explanation for the genesis or rationale for the issuance of the Kesavan letter, which reads:

> Kindly be informed that we have no objection for Conaire Engineering Sdn Bhd LLC to proceed to institute attachment proceedings on monies paid into Court by Tamouh Investment LLC and Aldar Properties.

[97] Among the facts noted by the LJ was that no one from the firm M/S Kesavan was called to testify on behalf of the defendants as to why the said 'Kesavan Letter' was issued. In our view, the LJ correctly asked the pertinent question that if the defendants are not the parties named in the ADJ, then why did the defendants give their consent for the plaintiff to apply for the release of the monies which were attached by the Abu Dhabi Court (in reference to the letter from Messrs Kesavan).

[98] Also that no evidence was adduced that the letter was issued without the authority of the defendants. We are in agreement with the respondent that whilst neither DW1 nor DW2 could explain the rationale behind the issuance of the Kesavan letter, they also did not disavow or repudiate the said letter or suggest that it was an unauthorized letter. As such, that the LJ was not wrong in concluding that DW1 and DW2 were clueless about the Kesavan letter.

[99] We are also satisfied that it was not erroneous for the LJ to conclude based on his finding the Kesavan letter was an admission of liability by the appellants, the issues raised by the appellants to oppose the respondent's action at the HC were rendered irrelevant and bereft merits. Nevertheless, the LJ had given due consideration to these issues and made findings of fact based on a proper evaluation of the evidence as a whole.

CONCLUSION

[100] Before concluding, we would reiterate that the LJ had taken an approach that was correct in principle in regard to the enforcement of a foreign judgment as in this instance for a specific sum of money. Our attention was drawn by the respondent to *Meinhardt Singapore Pte Ltd v Teo A Khing Design Consultants Sdn Bhd* [2016] MLJU 532; [2016] 1 LNS 894, where in paras 7–8 of the judgment the court held:

> The Law regulating enforcement of foreign judgment in Malaysia
>
> Para [7] The Malaysian courts have on a number of occasions recognised that an in personam final and conclusive foreign judgment for a specific sum of money given by a court of competent jurisdiction, is valid and enforceable by a common law action for the amount due thereunder.
>
> Para [8] The Malaysian Courts in the Supreme Court decision in *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107; [1985] 1 LNS 131 have also recognised that a defendant in an action to enforce the common law enforcement of a foreign judgment, may resist such action on the following grounds that:
>
> (a) the foreign court has no jurisdiction;
>
> (b) the judgment was obtained by fraud;
>
> (c) the judgment would be contrary to public policy; and

(d) the proceedings in which the judgment was obtained were opposed to natural justice.

[101] Also to *Segaran Mathavan v Landfeld Quasa Engineering Sdn Bhd & Yang Lain* [2014] 1 LNS 158 at paras 27–28, p 22, where it was held that the court should consider 'circumstantial evidence' and proceed to look at all the surrounding factors and weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact' when the witnesses gave conflicting evidence.

[102] In arriving at the conclusion that the fourth translation was correct and credible, the LJ had considered all the contemporaneous documents and circumstances in support of the said translation shown by the plaintiff. In effect, the evidence as a whole and the surrounding factors disclosed without doubt that D1 and D2 were among the parties mentioned in the ADJ. As contended by the respondent, we are in agreement that the LJ had considered all the relevant documents ie, the letter of offer, letter from Messrs Kesavan, the ADJ and the four translations together with the evidence of PW1, PW2, PW3, DW1 and DW2 in totality.

[103] For the foregoing reasons, in our judgment, the appellants had failed to demonstrate to us that the trial judge who had seen and heard the witnesses and sufficiently evaluated all the evidence, both oral and documentary, had come to a finding that was plainly wrong, had erred in principle or had decided against the weight of evidence.

[104] We, therefore, find no merits in law or fact in this appeal to warrant intervention against the reasoned decision of the trial judge. We thus, dismiss this appeal with costs. Costs of RM10,000 to be paid by each appellant to respondent subject to allocator.

Appeal dismissed with costs of RM10,000 to be paid by each of appellant to respondent subject to allocator.

Reported by Dzulqarnain Ab Fatar